No. 06-464

IN THE

Supreme Court of the United States

The State of Ohio,

Petitioner,

v.

Stephen F. Farris

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Ohio

BRIEF IN OPPOSITION

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January 3, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

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STATEMENT OF THE CASE

The State seeks review of one of the first cases applying this Court's recent decision in *Missouri v. Seibert*, 542 U.S. 600 (2004), to address a question that has been considered by only a handful of state and federal courts and which ultimately has no bearing on the outcome of this case.

1. On the afternoon of December 18, 2002, Officer Richard Menges pulled over respondent Stephen Farris for speeding. Pet. App. at 1a. "When Farris lowered the passenger window, Menges smelled a light odor of burnt marijuana coming from inside the car. Menges had not observed Farris smoking, nor did he see him throw anything out a window." *Id.* Without administering a sobriety test, Officer Menges conducted "a pat-down search and found no evidence of contraband or drugs." *Id.* Officer Menges then "took [respondent's] car keys, and escorted [respondent] to his patrol car where he ordered [him] to sit in the passenger seat." *Id.* at 25a. "While they were seated in the front of the cruiser . . . [w]ithout administering a *Miranda* warning . . . Menges told Farris that he was going to search the car and then specifically asked whether there were any drugs or drug devices in the car." *Id.* at 2a. Farris admitted that there was a marijuana pipe in a bag in the trunk of the car. *Id.* Immediately thereafter, "Menges . . . administered *Miranda* warnings, but did not tell Farris that his previous admissions could not be used against him. He then asked Farris the same questions and obtained the same responses regarding the location of the drug paraphernalia." *Id.* Another officer arrived and, after finding nothing in the interior of the car, the officers searched the trunk and found a marijuana pipe and cigarette papers. *Id.*

Respondent filed a suppression motion on April 18, 2003, arguing that his statements both before and after the *Miranda* warnings were inadmissible because he was in custody when Officer Menges questioned him and because he was never properly afforded his *Miranda* rights. *Id.* at 25a.

He also argued that the pipe Officer Menges had seized from his trunk was inadmissible because it was the fruit of an illegal interrogation and because the officer lacked any independent basis for searching the trunk of his car. The State conceded that respondent was in custody during the interrogation and that the statements Officer Menges obtained before administering the *Miranda* warnings therefore were inadmissible.[1] But the State nonetheless contended that the administration of the warning was necessarily sufficient to render respondent's identical post-warning statements admissible.

The trial court held an evidentiary hearing on the suppression motion. At the hearing, Officer Menges acknowledged that respondent first disclosed the existence of the marijuana pipe in his trunk in response to questioning without any *Miranda* warning. Tr. of Proceedings at 13-14, *State v. Farris*, No. CRB02-12-0101 (Wayne County Mun. Ct. Apr. 18, 2003). The officer did not claim that his failure to provide the warning was based on any confusion about whether respondent was in custody during the interrogation. Nor did Officer Menges ever suggest that his failure to administer *Miranda* warnings at the outset of the interrogation was some kind of accident or oversight. Rather, Officer Menges matter-of-factly acknowledged that after giving the

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[1] The state conceded the issue of custody before the Ohio Court of Appeals and in its brief in opposition to respondent's request for discretionary review by the Supreme Court of Ohio. *See* Br. of Pl.-Appellee at 5, *State v. Farris*, No. 03-CA-0022, (Ohio Ct. App. Feb. 25, 2004); Mem. in Opp'n of Appellee at 4, *State v. Farris*, 849 N.E.2d 985 (Ohio July 12, 2006) (No. 04-604). The State later attempted to contest the issue of custody in its merits brief in the Supreme Court of Ohio. *See* Br. of Pl.-Appellee at 2, *State v. Farris*, 849 N.E.2d 985 (Ohio July 12, 2006) (No. 03-CA-0022). However, the Supreme Court of Ohio concluded that respondent was in custody during the interrogation. *See* Pet. App. at 5a.

warning, he "re-asked [respondent] the same questions over again." *Id.* at 26. He also indicated that in his post-warning questioning he referred back to respondent's prior confession by asking "where the marijuana pipe" respondent had previously acknowledged having was located. *Id.* at 14. Respondent told him it was in a bag in the trunk. *Id.*[2]

Although the trial court found that respondent was in custody and that his pre-warning statements were inadmissible, it ruled that his post-warning statements were admissible because, in the court's view, "full *Miranda* rights were given and voluntarily waived." Pet. App. 36a. Accordingly, the court ruled that both the post-warning statements and the subsequently recovered contraband were admissible. *Id.* at 36a-37a.

Following the court's rulings, respondent pleaded no contest to possession of drug paraphernalia, while reserving the right to appeal the denial of his suppression motion. *Id.* at 26a. The court fined respondent one hundred and fifty dollars and suspended his driver's license for six months. *Id.*

2. The Ohio Court of Appeals affirmed. It held that respondent's post-*Miranda* statements were admissible because "both sets of [respondent's] inculpatory statements were voluntary," *id.* at 29a, and because "[t]he mere fact that the officer immediately repeated the same question following the *Miranda* warnings should have indicated to [respondent], a college student, that he was free to embrace his *Miranda* rights and remain silent," *id.* at 30a

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[2] Officer Menges' testimony on this score reads in full: "Um, I went ahead and read him his rights and after asking him if he understood and he advised that he did understand. Um, I asked him where the marijuana pipe was located and at that point he said that it was located in the trunk in one of his bags." Tr. of Proceedings at 14, *State v. Farris*, No. CRB02-12-0101 (Wayne County Mun. Ct. Apr. 18, 2003).

3. The Supreme Court of Ohio granted discretionary review and reversed. The court analyzed the admissibility of both respondent's statements and the physical evidence in light of the requirements of both the federal and state constitutions, noting that the "Ohio Constitution . . . is a document of independent force" which the Ohio Supreme Court sometimes construes to provide greater protection than the related provisions of the federal constitution. *Id.* at 17a (internal quotation omitted). Both require administration of *Miranda* warnings, although, the court explained, the consequences of a *Miranda* violation may vary under the state and federal constitutions. *Id.* at 17a-18a.

The court first held that respondent's post-warning statements were inadmissible. *Id.* at 3a-14a. The court did not say whether it was applying the federal or state constitution, or both, but it did look to this Court's decisions in *Oregon v. Elstad*, 470 U.S. 298 (1985), and *Missouri v. Seibert*, 542 U.S. 600 (2004), which had been decided during the pendency of the appeal. The court observed that the two cases "stand on opposite sides of the line defining where prewarning statements irretrievably affect postwarning statements." Pet. App. 8a. *Elstad* held admissible inculpatory statements a suspect made to an officer after being *Mirandized* at police station, even though during a "brief discussion" at a suspect's home an hour earlier a different officer had by "oversight" prompted him to admit he had been at the scene of the crime. *See id.* at 8a-10a. *Seibert*, by contrast, held inadmissible a post-warning confession that was substantively identical to a pre-warning confession that the police had just obtained by means of an orchestrated attempt to evade *Miranda*. 600 U.S. at 604-05 (plurality opinion). A plurality of the Court explained that inculpatory statements repeated after mid-interrogation *Miranda* warnings were admissible only if the "warnings could function 'effectively' as *Miranda* requires." *Id.* at 611-12. Justice Kennedy concurred in the judgment, positing that "[w]hen an

interrogator uses [a] deliberate, two-step strategy, predicated upon violating *Miranda* . . . , postwarning statements that are related to the substance of prewarning statements must be excluded absent specific, curative steps." *Id.* at 621 (Kennedy, J., concurring in the judgment).

The Supreme Court of Ohio found that the interrogation of respondent in this case was "much closer to *Seibert* than to *Elstad*." Pet. App. 12a. The court observed,

> the questioning . . . covered exactly the same subject both before the warning and after the warning. Both of [respondent's] statements were made in the police cruiser to the same police officer within moments of each other. Temporally and substantively, Menges's questioning of [respondent] constituted a single interrogation. Menges made no attempt to tailor the *Miranda* warning he eventually gave to the particular situation and did not convey any distinction whatsoever between statements that might come after the warning and those that came before. Thus, [respondent] was not in a position to make a *Seibert* informed choice.

Id.

The court noted, "*Seibert* presented the rare case in which the officer admitted that the two-part questioning was intentionally coercive." *Id.* at 14a. The court further observed that "*Seibert* was a plurality opinion, leaving somewhat in doubt whether the intent of the officer in garnering the prewarning statement is important in determining whether a postwarning statement is admissible," given the importance Justice Kennedy placed on the fact that the failure to give the *Miranda* warning at the outset was intentional in *Seibert*. *Id.* at 13a. But the court concluded that a "seeming lack of *official* police strategy" in the record in this case (developed before *Seibert* was decided) "to intentionally bait suspects into talking before the *Miranda* warning," *id.* at 13a (emphasis added), was insufficient to

render the statements admissible. Without saying whether it was undertaking to interpret *Seibert* or declare the rule under the Ohio Constitution, the Supreme Court of Ohio stated that "[w]e agree with the *Seibert* plurality and dissent that the intent of the officer doing the questioning is not relevant in a *Miranda* analysis." *Id.* at 14a. "*Miranda* itself provides a bright line for police behavior, and we believe that a bright line is also necessary in these types of cases." *Id.* Enforcing that line, the court held that respondent's post-warning statements should have been suppressed. *Id.*

Relying on similar considerations, the court then ruled that the physical evidence obtained as a result of those statements should have been excluded under the Ohio Constitution. The Court acknowledged that in *United States v. Patane*, 542 U.S. 630 (2004), this Court held that failure to provide required *Miranda* warnings does not support suppression of physical evidence seized as a result of unwarned statements. Pet. App. 14a-15a. The Supreme Court of Ohio, however, concluded that "Section 10, Article I of the Ohio Constitution provides greater protection to criminal defendants than the Fifth Amendment to the United States Constitution." *Id.* at 17a-18a. In particular, the court held that under the Ohio Constitution, "evidence obtained as the direct result of statements made in custody without the benefit of a *Miranda* warning should be excluded." *Id.* at 18a. To hold otherwise, the Court concluded, "would encourage law-enforcement officers to withhold *Miranda* warnings" in cases like this where "physical evidence is central to a conviction and testimonial evidence is not." *Id.* "We believe that the overall administration of justice in Ohio requires a law-enforcement environment in which evidence is gathered in conjunction with *Miranda*, not in defiance of it." *Id.*

REASONS FOR DENYING THE WRIT

Petitioner asks this Court to resolve whether the plurality or Justice Kennedy's concurrence in *Missouri v. Seibert*, 542 U.S. 600 (2004), governs the analysis of two-step interrogations. That question does not warrant review by this Court at this time and, in any event, this case presents a poor vehicle for addressing it. In the two years since this Court decided *Seibert*, only a handful of courts have had occasion to consider challenges to two-step interrogations, and none appear to have found that strictly applying the plurality or Justice Kennedy's opinion was outcome-determinative in any case. To the extent that the Supreme Court of Ohio took a different initial theoretical approach than a few other courts have taken, and to the extent that approach is grounded in federal law and not the more protective Ohio Constitution, there is little reason to believe that any existing conflict has real practical significance.

This case illustrates the point. The record here – which was developed before *Seibert* was decided – strongly suggests that respondent's post-warning statements are inadmissible under either the plurality or Justice Kennedy's approach in *Seibert*, or even under a proper application of *Oregon v. Elstad*, 470 U.S. 298 (1985). This is because there is no evidence that the police officer's failure to give respondent his *Miranda* warnings at the outset of the interrogation was any kind of "good faith" error – or, indeed, that it was anything other than an intentional omission (regardless of whether any "official" police strategy to this effect exists in Ohio, Pet. App. 13a). Moreover, respondent's statements would be inadmissible even under *Oregon v. Elstad*, because the officer exploited respondent's pre-warning statements to pressure him into waiving his right to remain silent.

Accordingly, this Court should deny the petition in order to allow further consideration and application of *Seibert* in the lower courts and to await, if necessary, an appropriate case

with a record developed in a post-*Seibert* evidentiary hearing to resolve any substantial conflict that may arise in the future.

I. The State Exaggerates The Extent And Importance Of Any Disagreement Among The Courts of Appeal And State Supreme Courts.

Petitioner's claim of a significant and entrenched division among the lower courts over the proper application of the Court's decision in *Seibert* is meritless. Even in petitioner's greatly exaggerated estimation, only five out of fifty state supreme courts, and three out of twelve federal circuits, have had occasion to apply *Seibert* since it was decided two years ago. The actual numbers are half that, and any disagreement is virtually nonexistent. In reality, it is too early to tell whether there will ever be a conflict of any practical import that warrants review by this Court.

1. Petitioner argues that "[t]hree circuit courts and the Supreme Court of Kentucky[] have recognized Justice Kennedy's opinion as the proper holding of *Seibert*" while "at least three state supreme courts, including Ohio's, have treated the *Seibert* plurality as the holding of the case." Pet. 10. This is incorrect. In fact, outside of this case, petitioner is unable to identify any conflict among the state supreme courts and/or the federal courts of appeal.

a. Petitioner first exaggerates the number of courts applying Justice Kennedy's opinion to resolve suppression claims in two-step interrogation cases.

One of the decisions cited by petitioner, *United States v. Black Bear*, 422 F.3d 658 (8th Cir. 2005), expressly found that "[t]he *Seibert* case is inapposite to this case," *id.* at 664. The defendant in *Black Bear* had been given a *Miranda* warning and signed a waiver form before taking a polygraph. Immediately after the polygraph exam, law enforcement agents asked the defendant additional questions. *Id.* at 663. The agents then turned on a tape recorder, repeated the *Miranda* warning, and questioned the defendant on tape. *Id.*

The district court suppressed the taped statements under *Seibert*, but the Eighth Circuit reversed. The court found that *Seibert* was inapplicable because "*Miranda* warnings were given at the *beginning* of a continuous interrogation in the same room by the same officer who witnessed the warning at the outset." *Id.* at 664 (emphasis added).

In two of the other cases – *United States v. Stewart*, 388 F.3d 1079 (7th Cir. 2004), and *Jackson v. Commonwealth*, 187 S.W.3d 300 (Ky. 2006), *cert. denied sub nom. Haydon v. Kentucky*, 127 S. Ct. 142 (2006) – the courts were unable to determine the proper result under *Seibert* because the trial courts in those cases had conducted suppression hearings without the benefit of *Seibert* and accordingly had not made findings with respect to important factual questions such as whether the officers had deliberately withheld *Miranda* warnings during the initial phase of the interrogations. *Stewart*, 388 F.3d at 1086, 1091; *Jackson*, 187 S.W.3d at 308-09. Thus, while the Seventh Circuit and Kentucky Supreme Court indicated that they would apply Justice Kennedy's approach, neither court actually applied that standard. As a result, neither court has yet addressed basic questions of how *Seibert* is to be applied, including, for instance, who has the burden of establishing the officer's state of mind and what kind of circumstantial evidence may suffice to prove deliberateness. And, because of the lack of an adequate record, it was unclear in either case whether any difference between Justice Kennedy's and the *Seibert* plurality's approaches would have led to a different outcome.

The difference in standards may also have been irrelevant in the final case, *United States v. Mashburn*, 406 F.3d 303 (4th Cir. 2005), where the failure to initially provide a *Miranda* warning was plainly an oversight, *see id.* at 305, 309

n.5, and took place in circumstances quite similar to the facts of *Elstad*. *See id.* at 305.[3]

b. Petitioner likewise is incorrect in asserting (Pet. 11-12) that the supreme courts of Vermont and Louisiana have applied the *Seibert* plurality analysis to resolve cases involving two-step interrogations.

The decisions from Vermont and Louisiana are simply inapposite because neither involved a two-step interrogation in which the defendant is initially questioned without *Miranda* warnings, then given the warning and subjected to further questioning. The defendant in the Vermont case, *State v. Yoh*, 910 A.2d 853 (Vt. 2006), received *Miranda* warnings when he was first arrested and before each interview. *Id.* at 857-59. The violation of his *Miranda* rights was not the failure to provide the warning, but rather the failure to stop questioning when the defendant invoked his right to remain silent and asked for an attorney. *Id.* at 858, 860-61. Later, the defendant initiated further questioning, was given another *Miranda* warning, and confessed. *Id.* at 858-59. The Vermont Supreme Court held that the confession was admissible, despite the *Miranda* violation, because it came only after the defendant himself voluntarily initiated further discussions with the police. *Id.* at 862. While the court noted the defendant's reliance on *Seibert*, it recognized that it was faced with a different question – whether to exclude a confession when "police refused to end questioning after the defendant had invoked his *Miranda* rights, but reissued the

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[3] The State also implies that *People v. Paulman*, 5 N.Y.3d 122 (2005), holds that Justice Kennedy's test is the governing test. Pet. at 13. However, *Paulman* concluded that the statement in that case was admissible under either the plurality or Justice Kennedy's standard. *Paulman*, 5 N.Y.3d at 133 n.5 ("Because the statements in this case are admissible under the plurality's more stringent test, they are necessarily admissible under Justice Kennedy's analysis.").

Miranda warnings prior to the defendant's confession after the defendant had initiated a second interview," *id.* at 862 – and relied instead on an on-point decision from the Ninth Circuit. *Id.*

Similarly, in *State v. Leger*, 936 So. 2d 108 (La. 2006), Supreme Court of Louisiana rejected the defendant's reliance on *Seibert*, finding the "circumstances presented here to be distinguishable from those at issue in *Seibert*," *id.* at 133, because the "defendant had been *Mirandized* repeatedly and had previously signed a waiver of rights form" before the interview in which he confessed, *id.* at 133-34.

2. That leaves petitioner with the claim that the Supreme Court of Ohio created a conflict with a few federal courts of appeal with respect to exactly what theoretical approach applies to two-step interrogations after *Seibert*. There is no good reason to believe that it did. While the Supreme Court of Ohio did embrace the test applied by the plurality in *Seibert*, it is unclear whether the court adopted that test as a matter of state or federal law. In his brief to the court below, respondent argued that his statements should be suppressed under both state and federal law. *See* Br. of Appellant, at 9-13, *State v. Farris*, 849 N.E.2d 985 (Ohio July 12, 2006) (No. 03-CA-0022). In its decision, the Supreme Court of Ohio made clear that *Miranda* warnings are required under the state constitution which, the court took pains to point out, in some cases "provides greater protection to criminal defendants" than does the federal constitution. Pet. App. 18a. The court demonstrated its willingness to depart from this Court's precedent as a guide for state constitutional protections in this very case, explicitly declining to adopt the suppression rule of *United States v. Patane*, 542 U.S. 630 (2004), and holding instead that under state law, "evidence obtained as the direct result of statements made in custody without the benefit of a *Miranda* warning should be excluded." Pet. App. 18a.

Although the Supreme Court of Ohio did not speak as clearly with respect to the exclusion of petitioner's

statements, there is reason to believe that the Court adopted the *Seibert* plurality test to effectuate respondent's rights under the Ohio Constitution. In resolving the tension between the plurality and Justice Kennedy's opinions, the Ohio Supreme Court spoke in terms demonstrating an independent exercise of judgment indicative of the court's interpreting state law rather than attempting to discern and follow this Court's federal jurisprudence. Thus, the court "*agree[d]* with the *Seibert* plurality," rather than declaring the plurality opinion to govern the case of its own force. *Id.* at 14a (emphasis added). And in explaining this conclusion, the court did not justify its decision by reference to the text of the *Seibert* opinion, but rather upon its own "*belie[f]* that a bright line is also necessary in these types of cases." *Id.* (emphasis added). While petitioner would have this Court view such statements as evidence of the Ohio Supreme Court's intent to "effectively overrule[] a decision of this Court regarding federal law in Ohio," Pet. 16, the more plausible and respectful interpretation is that the court was quite aware of the limitations of its authority to resolve any divergence between the plurality and Justice Kennedy's opinions as a matter of federal law, and wisely chose to avoid the problem by adopting the plurality rule to effectuate the state constitution.

Of course, if it becomes apparent in future cases that the Ohio courts are applying the *Seibert* plurality test as a matter of federal, rather than state law, and if other courts adopt the same approach, this Court will have ample opportunity to resolve any split of authority at that time. The State can hardly claim that its interest in this particular prosecution – a misdemeanor resulting in a small fine and a six-month suspension of a driver's license – is sufficiently weighty to require this Court's immediate and premature intervention.

4. Awaiting further consideration and application of *Seibert* in the lower courts also makes sense for the additional reason that it may become apparent with experience that the

question presented is of little general importance. Cases involving pre-*Seibert* interrogations are clearing out of the courts, and police departments on the ground are just beginning to adjust to *Seibert*. As they do so, there is every reason to believe that two-step interrogations triggering litigation will prove to be rare. *Miranda*'s requirement that officers advise suspects of their rights at the outset of custodial interrogations is well-established and understood by all police officers. This Court's decision in *Seibert* should also significantly deter officers from using the two-step interrogation method. When such cases do arise, therefore, there is every reason to expect that the failure to provide the initial warning either will have been inadvertent (in which case the statement is unlikely to be suppressed under either *Seibert* standard)[4] or that it will occur in circumstances giving rise to an inference of deliberation (in which case the statement ordinary will be suppressed under either *Seibert* standard).[5]

Even if some small fraction of intermediate cases eventually arise in which the difference in the *Seibert* standards seems, at least theoretically, be outcome-determinative, it is too early to know whether the different standards will actually produce divergent results. For example, no court has yet decided who bears the burden of proof regarding deliberateness. *See, e.g.*, *Mashburn*, 406 F.3d

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[4] *Compare Seibert*, 542 U.S. at 614-15 (plurality opinion), *with id.* at 622 (Kennedy, J., concurring in the judgment).

[5] *See, e.g.*, *Stewart*, 388 F.3d at 1091 (7th Cir. 2004) (noting that once deliberateness is found, "the analysis of the *Seibert* plurality and Justice Kennedy's concurrence merge"). Notably, Justice Kennedy's test looks to the presence of "curative measures," and the curative measures that he suggests are nearly identical to the objective factors suggested by the plurality in its test for "effectiveness." *Compare Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment), *with* 542 U.S. at 615-16 (plurality opinion).

at 309 n.5 (reserving this question). But if courts follow the general rule that the government carries the burden of establishing that it obtained a valid waiver of the right against self-incrimination, *Colorado v. Connelly*, 479 U.S. 157 (1986), cases like this one – in which records lack definitive proof either way – will not turn on which standard from *Seibert* controls. The State's failure to provide any excuse for the officer undertaking a two-step interrogation will be dispositive. In any event, it is clear at this point that it is far too soon for the State to insist that the nascent divergence of authority it alleges is so important as to require immediate resolution by this Court.

II. This Case Presents A Poor Vehicle For Answering The Question Presented.

Even if an important and substantial conflict over the legality of two-step interrogations existed, this case would be a poor vehicle for resolving it.

1. The resolution of the question presented is unlikely to have any impact on the eventual resolution of the case.

First, there is no ground to believe that the State would succeed under either the plurality or Justice Kennedy's analysis in *Seibert*. As discussed *infra*, the State failed to establish below that the failure to provide initial *Miranda* warnings was inadvertent and, accordingly, respondent's admissions would be subject to suppression under Justice Kennedy's standard as the product of a "two-step interrogation technique . . . used in a calculated way to undermine the *Miranda* warning." *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment). Moreover, even if this Court concluded that the failure to provide warnings was not deliberate, the statements would nonetheless be suppressed under *Elstad*. In that case, this Court recognized that a midstream *Miranda* warning may be "improper" – and thus insufficient to avoid suppression of post-warning statements – if the officer "exploit[s] the unwarned admission

to pressure respondent into waiving his right to remain silent." *See Elstad*, 470 U.S. at 316-18; *see also Seibert*, 542 U.S. at 621 (Kennedy, J., concurring in the judgment) (reaffirming this principle); *id.* at 628-29 (O'Connor, J., dissenting) (same); *Miranda v. Arizona*, 384 U.S. 436, 476 (1966) (evidence that suspect was "tricked" into waiving his rights "will, of course, show that the defendant did not voluntarily waive his privilege."). Here, Officer Menges described that after providing the *Miranda* warning, he immediately referred back to the prior unwarned statement, first asking not *whether* there was any contraband in the car, but rather *where* the contraband was located. Tr. of Proceedings, at 14, *State v. Farris*, No. CRB02-12-0101 (Wayne County Mun. Ct. Apr. 18, 2003). As Justice Kennedy observed in *Seibert*, "[r]eference to the prewarning statement was an implicit suggestion that the mere repetition of the earlier statement was not independently incriminating." 542 U.S. at 621. Thus, in a case similar to this one, the Alaska Court of Appeals held that the police officer's interrogation was improper under both the plurality's test in *Seibert* and the exploitation prong of *Elstad* reaffirmed by the other members of the *Seibert* Court. *See Crawford v. State*, 100 P.3d 440, 450 (Alaska Ct. App. 2004) ("[E]xploitation" exception of *Elstad* met where officer elicited confession, immediately administered *Miranda* warning, "and then, essentially without pause, . . . reminded [the defendant] of this confession and asked him to re-affirm it.").

Second, as noted above, the Supreme Court of Ohio may well have intended to adopt the *Seibert* plurality analysis as a matter of state constitutional law, and might do so explicitly on remand even if this Court were to hold that the plurality test was inapplicable here as a matter of federal law. *Cf. Piccirillo v. New York*, 400 U.S. 548, 549 (1971) (per curiam) (dismissing writ as improvidently granted when it became clear that state law ground would resolve the case, making the Court's "determination upon the fundamental constitutional

question underlying this case . . . in no sense necessary to its resolution in this instance").

Finally, petitioner does not seek review of the Ohio Supreme Court's suppression of the physical evidence on state law grounds. *See* Pet. App. 18a (holding that "the physical evidence obtained as a result of the unwarned statements made by Farris in this case is inadmissible pursuant to Section 10, Article I of the Ohio Constitution"). Accordingly, respondent's conviction will be vacated and he will be entitled to a new trial no matter what this Court decides. At that trial, it is quite difficult to imagine the State persuading a jury that respondent was guilty of possession of drug paraphernalia beyond a reasonable doubt based solely on a police officer's testimony that he smelled an odor of marijuana in the car (but found no drugs or paraphernalia in the car) and that respondent told him there was a pipe in the car (which the prosecution is unable to produce). The State, for all practical purposes, is asking this Court to issue an advisory opinion.

2. The lack of an evidentiary record developed in light of the Court's decision in *Seibert* is an independent reason to deny certiorari in this case. This Court has repeatedly recognized that the development of constitutional principles is best undertaken in the context of concrete cases with fully developed records. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 221 (1983); *Massachusetts v. Painten*, 389 U.S. 560, 561 (1968) (per curiam). Yet the evidentiary hearing in this case took place before *Seibert* was decided and, for that reason, was not tailored to the factors the members of this Court found relevant in that case. Attempting to apply or elaborate *Seibert* in these circumstances is inadvisable as a general matter and would run the real risk of the Court being unable to resolve the case due to deficiencies in the record.[6]

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[6] This Court will have ample opportunity to return to *Seibert* in cases with fully developed records, if it chooses to do so. For

3. Finally, the State itself argued in the Supreme Court of Ohio that this case was a poor vehicle for resolving any questions relating to the application of *Seibert*, although for a different reason. When this Court issued its opinion in *Seibert* – after the Supreme Court of Ohio had granted discretionary review, but before briefing was completed – the State urged the state court to dismiss the appeal as improvidently allowed. Br. of Pl.-Appellee at 2, *State v. Farris*, 849 N.E.2d 985 (Ohio July 12, 2006) (No. 03-CA-0022). The State explained that "[b]ecause there was a United States Supreme Court decision, *Oregon v. Elstaad* [sic] (1985), 470 U.S. 298, which the state believed dispositive of the instant case, the state neglected to fully consider other issues in the case." *Id.* In particular, the State asserted that it had "wrongly conceded custody in its memorandum opposing jurisdiction and in its brief in the court of appeals." *Id.* While the State acknowledged that the Supreme Court of Ohio could hold it to its concession, it "respectfully suggest[ed] that other courts and lawyers would be better served if this Court considers the effect of *Missouri v. Seibert*, supra in a case in which custody depends not upon an erroneous concession but upon an actual arrest." *Id.* at 10. The State has not explained why it now believes that this case presents an appropriate vehicle to consider the effect of *Seibert*, despite its prior representations to the contrary to the court below.

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example, two of the cases cited by petitioner have been remanded for full evidentiary hearings on *Seibert* issues. *See United States v. Stewart*, 388 F.3d 1079 (7th Cir. 2004); *Jackson v. Commonwealth*, 187 S.W.3d 300 (Ky. 2006), *cert. denied sub nom., Haydon v. Kentucky*, 127 S. Ct. 142 (2006).

III. The Supreme Court Of Ohio Correctly Held That Respondent's Statements Should Be Suppressed.

Certiorari is also unwarranted because the Supreme Court of Ohio correctly ordered suppression of respondent's statements.

The admissibility of respondent's post-*Miranda* statements as a matter of federal law turns on this Court's decisions in *Elstad* and *Seibert*. In *Elstad*, prior to any *Miranda* warnings, the defendant made a cursory admission that he had been present at the scene of a robbery, telling a police officer: "Yes, I was there." 470 U.S. at 300-01. The defendant made the admission in his own living room, while a second officer was talking to the defendant's mother in another room. *Id.* This Court characterized the initial failure to warn as an "oversight" that was presumably explained either by "confusion" at the time as to whether the defendant was actually in custody or by the fact that the first officer had not yet begun interrogating the defendant. *Id.* at 315-16. The defendant was subsequently transported to the police station, where, one hour later, the second officer read him his *Miranda* warnings. *Id.* at 301. The defendant proceeded to make a full confession that went far beyond his initial statement that he "was there" at the robbery scene. *See id.* at 301-02. This Court held that the defendant's post-*Miranda* confession should not be suppressed simply because he had made an earlier, unwarned confession. *See id.* at 318.

The facts of *Seibert* present the "opposite extreme." *Seibert*, 542 U.S. at 616 (plurality opinion). There, the defendant was interviewed initially by an officer at the police station and confessed, prior to any *Miranda* warnings. *Id.* at 604-05. After a twenty-minute break, the same officer then read the defendant her *Miranda* rights and continued the interview, in the same location, obtaining a statement that was "'largely a repeat of information . . . obtained' prior to the warning." *Id.* at 605-06 (alteration in original). There was no question of confusion or oversight in *Seibert*, because the

defendant was clearly in custody and was clearly being interrogated. *See id.* at 616. The police officer also admitted to making a "conscious decision" to pursue a two-step interrogation technique in order to evade *Miranda*. *Id.* at 605-06. A majority of this Court held that on these facts, the defendant's post-*Miranda* confession should be suppressed. *See id.* at 604.

The Supreme Court of Ohio correctly determined that facts of this case are "much closer to *Seibert* than to *Elstad*." Pet. App. 12a. As in *Seibert*, the same officer obtained both the pre- and post-*Miranda* admissions. *Id.* The admissions were made moments apart and in the same location, inside the questioning officer's police cruiser. *Id.* Respondent's statements after the *Miranda* warnings were "virtually identical" to his pre-*Miranda* statements. *Id.* at 5a. In eliciting those statements, the officer relied on information respondent had divulged in his pre-*Miranda* confession. Tr. of Proceedings at 14, *State v. Farris*, No. CRB02-12-0101 (Wayne County Mun. Ct. Apr. 18, 2003). And there is no suggestion that the officer's failure to warn in this case was an issue of oversight or confusion as to whether Respondent was already in custody or being interrogated.

Under these circumstances, in fact, suppression was required under either the plurality or Justice Kennedy's analysis in *Seibert*. While Justice Kennedy would limit suppression to cases in which "the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning," 542 U.S. at 622 (concurring in the judgment), he did not elaborate on the circumstances under which such calculated behavior is to be found. "[T]he intent of the officer will rarely be as candidly admitted as it was [in *Seibert*]." 542 U.S. at 616 n.6 (plurality opinion). Lest the protections afforded under Justice Kennedy's view of *Miranda* be subject to easy evasion, defendants must be permitted to prove deliberateness through objective evidence regarding the nature of the interrogation. And, indeed, this

Court has long recognized that "[f]requently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds." *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) (equal opportunity employment case). Consistent with the need for "clarity" in the administration of *Miranda*, see *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment), and in light of the "temptations for abuse inherent in the two-step technique," *id.* at 621, the use of a two-step process in the absence of any testimony or evidence that the initial failure to warn was inadvertent should suffice to establish a deliberate evasion of *Miranda* for purposes of Justice Kennedy's test.

The officer in this case did not claim that he did "not realize that [respondent was] in custody." *Seibert*, 542 U.S. at 620 (Kennedy, J., concurring in the judgment). Nor was this a case in which the officer did "not plan to question the suspect or [was] waiting for a more appropriate time" to interrogate him. *Id.* Instead, it is uncontested that the officer took respondent into custody and intended to immediately interrogate him at the scene. And although the officer did not expressly admit that he withheld the *Miranda* warnings on purpose, he also did not deny that the failure to provide the warning was intentional. Indeed, the fact that the officer "immediately" (Pet. App. 2a) read Farris his *Miranda* warnings after obtaining a confession strongly suggests that his actions were intentional. It would not have been particularly believable for the officer to assert that although he initially forgot to issue the warnings, he just happened to remember *Miranda* a few seconds after obtaining respondent's initial confession.

To be sure, the Supreme Court of Ohio noted that there was a "seeming lack of an official police strategy" here to bait suspects into confessing and then repeating those damaging

statements after being given *Miranda* warnings. *Id.* at 13a. A "seeming lack" of such a strategy, of course, is not a finding that an official police strategy did not exist. But more importantly, even if no such "official" policy existed, that does not say anything with respect to whether the *individual officer* in this case decided on his own to evade *Miranda*. And Justice Kennedy's test looks to the intent of an individual interrogator and is not restricted to cases involving an "official" police strategy. *See Seibert*, 542 U.S. at 621-22 (Kennedy, J., concurring in the judgment).

In short, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and right to retained or appointed counsel." *Miranda*, 384 U.S. at 475. In light of the evidence as a whole, the Supreme Court of Ohio correctly determined that the State did not sustain that burden in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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January 3, 2007